SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,
Petitioner,

v.

MELVIN VARNISH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals (Appendix A) is reported at — F. 2d — (12/31/68).

The opinion of the United States District Court of New York for the Southern District is not reported and is set forth in Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 31, 1968. (R. 626)*

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* References to the Record are designated "R".

Constitutional Provision Involved

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Questions Presented

1. Is the published article upon which suit was brought herein entitled to the protection of the First Amendment to the United States Constitution?

2. Did the Court of Appeals below correctly apply Pennsylvania law?

3. Was there sufficient evidence on the record to establish that the article contained materially false statements as to respondent?

4. Assuming that the article contained some false statements as to respondent, was there substantial evidence on the record to establish that they were published with actual malice?

Statement

On or about March 8, 1964, the petitioner, Best Medium Publishing Co. Inc., published in its weekly publication, *The National Enquirer* (hereinafter *"Enquirer"*), an article which described how the respondent's wife, Joanne Varnish, suddenly killed their three children and then committed suicide in their home in Concord, California on the night of September 27, 1963 (Pl. Ex. 1; the article is also

reproduced in footnote 1 of the Court of Appeals' opinion, App. A2-3).*

The respondent contends that the article invaded his right of privacy. His amended complaint alleges no special damages but claims $3. million in general damages. There is no prayer for relief for punitive or exemplary damages (R. 337).

Plaintiff's residence at the time of the publication of the article was in Pennsylvania and, upon the trial, the parties stipulated that the case would be governed by the law of that State.

Because the alleged falsities of the article, insofar as they relate to Mr. Varnish, are crucial to the determination of this case, it is necessary to refer to the testimony of Mr. Varnish upon his cross-examination to determine whether the article contained material falsities about him (R. 48-72).

> (a) When asked whether the reference to him as being a "good husband" was true or false, Mr. Varnish said it was "true". (R. 50)
>
> (b) When asked whether "things always ran smoothly in his household", Mr. Varnish testified "By and large, yes". (R. 51)
>
> (c) When asked whether he and his wife had enjoyed bowling together "for years", Mr. Varnish testified they were only bowling in their "second year". (R. 52-53)
>
> (d) Mr. Varnish testified that the date reported in the article to be the date of the tragedy was false and was in fact "September 27". (R. 55)

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* References to the Appendix are designated "App.".

(e) Mr. Varnish testified that the language attributed to Mrs. Varnish in saying "goodnight" before he left to go bowling was different from his own recollection (R. 55-56). Actually, it does accord with the report of that conversation as it was furnished by Mr. Varnish to Sgt. Gardella (Pl. Ex. 2, see also Pl. Ex. 6).

(f) The article describes Mr. Varnish as "racing through the house" upon his return home from the night of the tragedy. He claimed upon trial that this was false in that he only "ran" through the house. (R. 58-61)

(g) The article attributed to Mr. Varnish the following statement:

> "I can't understand it. We had no troubles, no troubles at all. We were happy."

Mr. Varnish testified that he didn't know for sure what he had said. (R. 65-66)

(h) The article further read:

> "Varnish broke into tears, went from child to child, kissed each on the head and sobbed:
>
> " 'We'll have to forgive her. We'll have to forgive her.' "

Varnish testified that he "could have said that." (R. 68)

(i) In concluding the article stated:

> ". . . [I]t would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself."

Varnish testified that:

> "This implies that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (R. 69)

Respondent was then asked: ". . . Did you understand why your wife had killed herself? Did you know then, at that time?"

He answered: "I don't know to this day why my wife would kill herself. How would I know then?" (R. 70)*

Thus, by his own testimony, the plaintiff has admitted the truth of the concluding paragraph of the article.

Assuming that the article was materially false as to respondent, it was still incumbent upon him to establish that the article was published with knowledge that it was false or in reckless disregard for the truth. At the trial petitioner's sole witness, James Donahue, testified that in writing the article he relied on the news items which had appeared in other newspapers (Pl. Ex. 6; Dft. Ex. B), the police report (Pl. Ex. 2), and the coroner's report (Dft. Ex. C) (R. 104-135). A comparison of the language of the article (Pl. Ex. 1) and the said police report, especially, shows that Mr. Donahue followed this account of the known facts. Exercising such reasonable latitude as the author of any article may do, he omitted only those references from his article which might be deemed to have been uncomplimentary to or critical of the plaintiff (R. 127-131).

Thus, Mr. Donahue testified:

> "A. In the circumstances, I think it is an exceptionally nice story.
>
> "Q. Wasn't this written this way to get the feeling of irony? Isn't that the policy of— A. This is getting the feeling of the tragedy of the thing, which it really was.
>
> "Q. You think this got across the feeling of tragedy rather than the feeling of 'Isn't that pe-

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* The San Francisco *Examiner* on September 28, 1963, reported an interview with Varnish in which it reported that he said "he knew of no reason for the triple murder and suicide." (Pl. Ex. 6; see also Dft. Ex. B)

culiar?' A. No. I think that is much better than to say somebody was an unhappy person and she hated her husband and everything else. Do you think that's nice?

"Q. And your conclusion is that this is a fair appraisal of what happened? A. I tried to write a nice story.

"Q. You tried to write a nice story? A. That is right.

"Q. Did you try to write a truthful story? A. Under the circumstances, yes. Truthful. She killed herself.

"Q. And because she killed herself— A. I tried as much as I could to take the sting out of it." (R. 130-1)

It is submitted that the record is devoid of any substantial evidence proving that petitioner published the article with "malice" or with "calculated falsehood".

Upon completion of the respondent's case, the petitioner moved for a judgment for a directed verdict. Hon. Lloyd F. MacMahon, the Trial Judge, reserved decision. The jury, thereafter, brought in a verdict in favor of the respondent and awarded him $5,000. in compensatory damages and $15,000. in punitive damages. The petitioner then moved for judgment notwithstanding the verdict. Again, Judge MacMahon reserved decision. Thereafter by an order dated March 14, 1968, both motions of petitioner for a directed verdict and for judgment notwithstanding the verdict were denied. (R. 524 and App. B) Judgment accordingly in favor of the respondent was ordered, adjudged and decreed and so entered on March 15, 1968. (R. 527)

The Court of Appeals, per Chief Judge Lumbard, affirmed the judgment of the district court (App. A1-7), with Circuit Judge Hays dissenting (App. A7-8).

Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was conferred upon the district court by 28 U.S.C. §1332(a)(1).

Reasons for Granting the Writ

The Court of Appeals' opinion clearly establishes that the *Enquirer* article dealt with a matter of "public interest." That Court held:

> "While the scope of 'matters of public interest' has not yet been clearly defined, it cannot be doubted that the subject of the Enquirer article, a murder-suicide, is within that category. Cf. *Time, Inc.* v. *Hill, supra,* 385 U.S. at 388; *Jenkins* v. *Dell Publishing Co., supra,* 251 F. 2d at 450-52; Restatement (2d) Torts §652 F (Tent Draft No. 13, 1967)." (App. A4-5)

Having held that the subject article involved a matter of public interest, the Court recognized that "it was incumbent upon the plaintiff to establish that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth." (App. A5) The Court of Appeals was thus restating the rule first announced by this Court in *New York Times, Co.* v. *Sullivan,* 376 U.S. 254 (1964), and as thereafter applied in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). And in referring to *Time, Inc.,* the Court of Appeals stated:

> "[T]he United States Supreme Court held that First Amendment guarantees of speech and press forbid recovery, absent a showing of 'knowing falsity or reckless disregard for the truth,' in privacy actions involving 'matters of public interest.'" (App. A4)

However, the Court of Appeals unfortunately erred in two material respects. First, in determining whether the article was false in any material respect, the Court incorrectly applied Pennsylvania law. In holding that the article's characterization of Mrs. Varnish as a "happy woman" was false it is respectfully submitted that this untrue characterization of Mrs. Varnish could not be the predicate upon which her husband could mount his claim for invasion of *his* privacy, especially since he had admitted the truth of all material statements and acts attributed to him. Secondly, the Court erred in its finding that the respondent proved (a) that the article was materially false as to him; and (b) that there was substantial evidence that the petitioner published the article with malice.

Pennsylvania law

In Pennsylvania, the right of privacy rests on common law, *Aquino* v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A. 2d 422 (1959). In *Aquino,* the plaintiffs, parents of a daughter who was secretly married and then shortly thereafter divorced, sued to recover damages for invasion of their privacy allegedly caused by defendant's publication of a comparatively lengthy article naming plaintiffs and attributing to them certain actions and statements. The plaintiffs also complained that the illustration of a man and woman appearing above the article which purported to be that of plaintiffs' daughter Theresa and her husband did not in fact resemble them and that this also unlawfully invaded their privacy. The court in refuting this contention held:

> "The action is a personal action and the defendant is not liable to appellees [plaintiffs] for what it related about Theresa [daughter] but only what it related about them" (154 A. 2d at 430)

Therefore, even assuming that the characterizations of Mrs. Varnish were false, they would not serve as a basis for Mr. Varnish's action for the invasion of *his* privacy.

The court in *Aquino,* permitted plaintiffs to recover for invasion of their privacy giving as its reasons the fact that (a) the article was published for commercial purposes noting that the article appeared in defendant's "Sunday supplement"; (b) the article contained fictionalized statements and actions attributed to plaintiffs; and (c) the article clearly went beyond the limits of decency.

It is indeed doubtful in light of this Court's holding in *Time, Inc.* v. *Hill, supra,* that a publication for commercial purposes will defeat the constitutional protection of the First Amendment. In that connection this Court in *Time, Inc.* cited with approval the following:

> " 'That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' *Joseph Burnstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-502, 72 S. Ct. 777, 780, 96 L. Ed. 1098; see *New York Times, Co.* v. *Sullivan,* 376 U.S. at 266. . . ." (385 U.S. at 397)

An examination of the lengthy article in *Aquino* (154 A. 2 at 428-29, footnote 2), adequately demonstrates the reason for that court's holding. In comparison, one must search in vain for anything in the *Enquirer's* article (Pl. Ex. 1) that appears to be improper or indecent. Circuit Judge Hays in his dissenting opinion below held that:

> "Even if it be assumed that the article contains some false statements and that they were published knowingly or recklessly, there is *nothing in the statements*

> *as to the plaintiff* which is so offensive as to justify the verdict. That the article is in bad taste is not sufficient. It clearly does not go 'beyond the limits of decency,' as it must if plaintiff is to recover. See *Aquino* v. *Bulletin Co.*, 190 Pa. Sup. 528 (1959)." (App. A8; emphasis added)

One may easily conclude that the article is warm, gentle and sympathetic.

However, it is apparent from *Aquino* that this *mores* test is only relevant once it is decided that a publication is not constitutionally protected.

Aquino also held that the subjects of marriage and divorce are matters of "public interest," and the defendant was privileged to name plaintiffs and give their address even though the public record of the divorce only referred to them as the "parents". That court recognized that a publisher of a magazine or a newspaper has the privilege of publishing not only about those who are "public figures" but also about those obscure persons whom events have catapulted into public limelight. The court stated:

> "One who unwillingly comes into the public eye as in the case of a criminal, . . . or the subject of a striking catastrophe, is subject to the limitations on his right to be let alone. Both groups of persons are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention. Publishers are privileged to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." (152 A. 2 at pp. 425-26)

The *Aquino* court noted with approval the holding in *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (3rd Cir., 1958), cert. den. 357 U.S. 921 (1958). Reference to that case is

merited not only because it is so similar to the case at bar, but because the holding therein appears to be in conflict with the opinion in the Court of Appeals below.

*Jenkins** was a case in which defendant had published in its monthly magazine, "Front Page Detective," a photograph of a family of a homicide victim some four or five months after the event was reported in the newspapers. Recognizing that there is a protected area of privacy under Pennsylvania law, however "imprecisely defined," the court affirmed an order granting the defendant summary judgment and observed:

> "... the interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts have been reluctant to make such factually accurate public disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear and its offensiveness to ordinary sensibilities is equally clear." (p. 450)

The court also refused to look upon the publication of the tragic incident as a "commercial use." It completely discounted the appellants' principal contention that the publication was not entitled to the privileged status of ordinary

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* Prior to the commencement of this action in the District Court below, Varnish instituted a similar action against the *Enquirer* in the United States District Court for the Western District of Pennsylvania (Civil Action No. 64-401). The complaint was dismissed for lack of jurisdiction. Although the merits were briefed by both sides, dismissal for lack of jurisdiction prevented the court from effecting a substantive dismissal also. Nevertheless, the court stated:

> "... it is suggested to plaintiff's counsel that he carefully examine the Court of Appeals' decision in this Circuit, *Jenkins* v. *Dell Publishing Company,* 251 F. 2d 447, (1958). From that opinion it does not appear in any event that the plaintiff can succeed in this District."

news items because of any alleged intended appeal to satisfy a public craving for "entertainment" rather than to provide information. The court further observed:

> "A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. *Still others are entertained by news which has an incongruous or ironic aspect.* Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." (p. 451; emphasis supplied)

In referring to defendant's magazine the court stated:

> "While it is not an intellectual or educational publication and would hardly be characterized as appealing to 'elevated tastes', we find nothing in it which could fairly be characterized as disgusting, or indecent, or appealing to 'depraved tastes'. A jury should not be permitted to find an otherwise privileged publication to be tortious because it appears in such an environment as this magazine provides." (p. 452)

The foregoing case would appear to be on all fours with the case presently at bar, both as to the substance of the

articles and the time lapse between the occurrence of each event and its subsequent publication.

Therefore, even assuming that the *Enquirer's* article was *ironic*, as contended by respondent (see Court of Appeals' opinion—App. A4), this in and of itself would not defeat the publication's privileged status. Moreover, it is submitted that the Court of Appeals erred in attributing any significance to the supposed commercial motive of petitioner for its failure to print the entire suicide note of Mrs. Varnish. (App. A5, footnote 4). *New York Times* v. *Sullivan, supra,* at p. 266.

In addition, the *Aquino* court cited with approval *Metter* v. *Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939), in which the plaintiff's name was used in a newspaper report of the facts surrounding his wife's suicide. The court affirmed the dismissal of the complaint, stating, in part:

> " . . . no reference was made to him in the printed newspaper article, except that he was [the] husband and that he was quoted with reference to the causes to which he ascribed his wife's suicide." (p. 495)

The court took pains to point out also that suicides become a matter of investigation by the coroner, whose report is thereby a public record, citing *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (1931); California Code, § 27491.

Failure of proof that article is materially false as to respondent and failure of proof of calculated falsehood.

The petitioner's constitutional rights hinge upon an implication. Mr. Varnish contends that the article:

> "*implies* that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (Tr. 69; emphasis added)

A person reading this article will no doubt find it very difficult indeed to arrive at such an implication unless it was suggested to him by Mr. Varnish.

Mr. Varnish testified that he did not understand why his wife had killed herself. (R. 70). In addition, an article in The San Francisco *Examiner* on September 28, 1963, reported an interview with Mr. Varnish in which it reported that he said "he knew of no reason for the triple murder and suicide". (Pl. Ex. 6; see also Dft. Ex. B). That same article was used by Mr. Donahue in writing the *Enquirer* article. (R. 114)

Judge Hays in his dissenting opinion below summarizes Mr. Varnish's case and its lack of merit as follows:

> "Plaintiff's entire argument rests, as the majority indicates, on the theory that the story portrayed him in a false and unsympathetic light by implying that he was lacking in sensitivity and understanding. He objects particularly to the statement in the article that he did not understand why his wife had killed herself. But plaintiff testified that he did not understand why his wife had killed herself and that he could not swear that he had not told the investigating police about his inability to understand.
>
> "If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light.
>
> "The irony of the description of the wife as happy cannot properly be held to justify withdrawal of constitutional protection." (App. A7-8)

Line-by-line, paragraph-by-paragraph, interrogation of Mr. Varnish failed to elicit any material falsehood or substantial inaccuracy relating to Mr. Varnish in the published article. (R. 48-72) Judge Hays in his dissenting opinion stated:

> "I cannot agree with the majority's conclusion that the Enquirer article is materially false." (App. A7)

Moreover, minor inaccuracies and fictionalized dialogue will not alone defeat the constitutional protection afforded to publications dealing with matters of public interest. *Spahn* v. *Julian Messner, Inc.*, 18 N.Y. 2d 877 (1966), vacated and remanded, 387 U.S. 239, rearg., 21 N.Y. 124 (1967), probable jurisdiction noted, 37 U.S. Law Week 3133 (Oct. 14, 1968); *Kousscvitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S. 2d 779 (Sup., 1947), aff'd 272 App. Div. 759, 69 N.Y.S. 2d 432 (1st Dept., 1947).

In the absence of a showing that the article is materially false as to respondent, the article is protected by the First Amendment Immunity, and it cannot be subjected to any sanctions that may be construed to be applicable by reason of Pennsylvania doctrines of invasion of privacy. *Time, Inc.* v. *Hill, supra.*

What Mr. Varnish's action for the alleged invasion of his privacy boils down to is Mr. Donahue's reluctance and failure to tell the world how difficult Mrs. Varnish found her life with her husband to be. What Mr. Varnish is urging is that the publisher had a duty to describe the contents of the entire suicide note and that the omission of Mrs. Varnish's uncomplimentary description of her marriage with respondent was a tortious act.

A publisher is not a witness who has sworn to "tell the truth, the whole truth and nothing but the truth." A newspaper account or a magazine report of an event such as the Varnish tragedy is not to be measured by judicial standards of the elements of the crime of perjury. Further, however, the publisher may be selective in what he chooses to publish concerning the contents of a document such as Mrs. Varnish's letter. Certainly, he should have the right to refrain from having to mention the portions of such a letter which he considers offensive and uncomplimentary and clearly of no essential significance to the article he is publishing. Such selectivity is a necessary and legitimate attribute of the literary and publishing art. The First Amendment protection of freedom of press involves not only the right to report the news, but also the right to analyze and characterize.

Much reliance is placed upon the characterization of the late Mrs. Varnish as "the happiest woman in the neighborhood." Clearly, only Mrs. Varnish could have complained of that characterization and it is hardly reasonable that she would have or, that, having complained about it she could have had a cause of action against the defendant therefor. Certainly, the use of that language could not inure to the benefit of the respondent in the within action. Moreover, the police report makes reference to a neighbor, one Robert Maruska, as having stated that the family "get along well." (Pl. Ex. 2, p. 5). This also was the view of another neighbor, one Mr. Tramell (Pl. Ex. 2, p. 5). One news article (Dft. Ex. B) quotes the respondent as having said, "I can't explain it; we had no difficulties." Another article (Pl. Ex. 6) stated that the respondent knew of no reason for the tragedy.

As a matter of fact, the respondent himself testified on cross-examination that, by and large, things ran smoothly

in his household and there were certain times when his wife was bright and cheerful. (R. 50-52)

In view of the foregoing, it is evident that the published article was not known by the respondent to be false or that it was published with a reckless disregard for the truth. Such speculation as to the cause of the tragedy was certainly reasonable and well within the ambit of literary license.

Libel cases recently decided by this Court have provided "meaningful guidance" for ascertaining the definition of "reckless publication". Thus, *New York Times, Co.* v. *Sullivan,* 370 U.S. 254 (1964), denied recovery to a plaintiff because the record did not manifest that the publisher was aware of the likelihood that he was circulating false information. *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), emphasized the necessity for the evidence to show that the false publication was made with a "high degree of awareness" and that the constitutional protection afforded a publication will yield only upon proof of "calculated falsehood". In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), Mr. Justice Harlan, stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public in defamation articles. And in *St. Amant* v. *Thompson,* 390 U.S. 727, 736, (1968) this Court concluded that,

> "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be *sufficient evidence* to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [emphasis added].

Cf. *Pickering* v. *Board of Education,* 391 U.S. 563, 573-575 (1968).

And, as was noted above (p. 7), this same "standard" was extended by this Court in invasion of privacy cases. *Time, Inc.* v. *Hill, supra,* 385 U.S. 374, 387-88.

Upon his cross-examination, Varnish was repeatedly requested to single out and identify specific material falsities in the article concerning *himself* and he utterly failed to do *so.* (See pp. 3-5, *supra*) He regarded the characterization of his wife as "happy" or "happiest," to be false and, in the omission of the publisher to publish all the contents of her "death note" and thereby dredge up for public view all of the unpleasant details of his marriage, Varnish urged that the article

> "*implies* that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (R. 68; emphasis added)

In essence, the respondent's argument is a paradox: the considerate reluctance of the publisher to "invade the privacy" of his personal life constituted an invasion of his privacy. The publisher is to be damned for what it commendably refused to do.

So far as what was actually stated in the article, however, it is clear that in all those respects there was no meaningful or substantial departure from the truth.

If the judgment below is allowed to stand, a newspaper or magazine article may be attacked as deliberate fabrication whenever mere error occurs (however innocent) or whenever editorial or literary license or sheer space limitations omit assorted details and references, even offensive

ones, and the publisher thereby subjected to liability for invasion of privacy.

The tragic murder and suicide affecting Varnish's family were a legitimate area for inquiry by the publisher here into an all too common social malaise—a proper subject for an account of human plight and the attempt to escape one's problems.

Out of the welter of words used to describe this litigation about a nondefamatory publication, there remains one simple incontrovertible fact: a substantial connection between the tragic event and the article itself. In the absence of substantial evidence of intentional fabrication or a reckless disregard of truth, the article is endowed with the privilege of publication by the First Amendment.

To require the press to be totally accurate at its peril is precisely the kind of "self censorship" that was condemned in *New York Times Co.* v. *Sullivan,* 376 U.S. 254. That case dealt with freedom of the press in the context of libel. The law of privacy is the analog to defamation and is as focal to free press consideration as the problem posed in the *Times* case. In *Times,* the court emphasized that the constitutional protection does not turn on the truth, popularity or social utility of the ideas and beliefs published. It pointed out that Madison had once declared:

> "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." (at p. 271)

Certainly the story of a multiple murder and suicide can be equated with the subject matter of the article which appeared in *Life* Magazine for which suit was brought in *Time,*

Inc. v. *Hill, supra.* As Mr. Justice Brennan so aptly observed in that case,

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama,* 310 U. S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Bridges* v. *California,* 314 U. S. 252, 269. . . . 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]. '*Winters* v. *New York,* 333 U. S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '. . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .' *New York Times Co.* v. *Sullivan, supra,* at 271-272." (p. 388)

And his Honor further observed:

> "We create a grave risk of serious impairment of the indispensable service of free press in a free

> society if we saddle the press with the impossible burden of verifying to a certainty the facts associated with a person's name . . . particularly as related to nondefamatory matter." (p. 389)

In his concurring opinion, Mr. Justice Black described *Life's* conduct as "at most a mere understandable and incidental error of fact in reporting a newsworthy event." He went on to state at pp. 400-401:

> "One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy of the newsworthy facts.[3] Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society."

"[3] See, for example, *Curtis Publishing Co.* v. *Butts,* 351 F. 2d 702 ($3,000,000 libel judgment, cut to $460,000 on appeal), cert. granted, *post,* p. 811; *Associated Press* v. *Walker,* 393 S. W. 2d 671 (Tex. Civ. App.) ($500,000 libel judgment), cert. granted, *post,* p. 812; *New York Times Co.* v. *Sullivan,* 376 U. S. 254 ($500,000 libel judgment), reversed."

While concurring with the result, Mr. Justice Black foresaw grave consequences in the engrafting of any limitations upon the freedom of press in light of the clear mandate of the First Amendment.

Finally, one may consider the admonitions of Mr. Justice Douglas in the same case where, in his concurring opinion, he expressed the view that he was loath even to have fictionalization arm a plaintiff with a cause of action because, likening fictionalization to a water color, he looked upon it

as narrowing the ambit of the First Amendment, imperiling creative writing, and producing a "chilling effect" on free expression. Mr. Justice Douglas opposed recognition of fictionalization or "knowing or reckless falsity" as exceptions to the rights of a free press because such exceptions provide a jury with "almost unfettered discretion."

Mr. Justice Douglas further observed, in connection with the tragic incident that befell Mr. Hill and his family, the following:

> "Here a private person is catapulted into the news by events over which he has no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times, Co.* v. *Sullivan.* . . . Such privacy as a person normally has ceases when his life has ceased to be private." (p. 402)

In the case at bar, there was no substantial proof of either fictionalization or knowing or reckless falsity. All the more in point, therefore, is Mr. Justice Douglas' observation:

> "A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day." (p. 402)

As Judge Hays stated below:

> "The news media must be allowed wide leeway in deciding what they will report and how they will report it." (App. A8)

CONCLUSION

The majority opinion of the Court of Appeals has in effect created a new exception to a publisher's right of freedom of press. That Court has held that a plaintiff may recover in an action for invasion of privacy if a publication contains allegedly false statements about another person which may cast the plaintiff in an *ironic* light. This holding presages alarming consequences for press freedom. It would gravely impair that fundamental right by severely restricting the modes of journalistic and literary expression to the detriment of our free society. For this reason especially as well as for the reasons heretofore set forth, this petition should be granted.

Respectfully submitted,

KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Petitioner

IRWIN M. TAYLOR
STUART NEWMARK
of Counsel

Proof of Service

I, Irwin M. Taylor, a member of the Bar of the Supreme Court of the United States and of counsel to attorneys for Petitioner, hereby certify that on the 27th day of February, 1969, I served copies of the foregoing petition for a writ of certiorari on the Respondent Melvin Varnish, by mail, by depositing three copies of same enclosed in a duly addressed and secured envelope in a United States mail box, with first class postage prepaid, addressed to Jaffe Cohen Berman & Crystal, Esqs., attorneys of record for Respondent Melvin Varnish, at 56 Pine Street, New York, New York 10005, that being their post office address indicated upon the last papers served by them.

/s/ Irwin M. Taylor
Irwin M. Taylor

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 107—September Term, 1968.

(Argued October 4, 1968 Decided December 31, 1968.)

Docket No. 32359

MELVIN VARNISH,

Plaintiff-Appellee,

—v.—

BEST MEDIUM PUBLISHING CO., INC.,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and HAYS, *Circuit Judges.*

Appeal from a jury verdict of $5,000 compensatory and $15,000 punitive damages against defendant publishing company for invasion of privacy in a diversity case, Lloyd F. MacMahon, *J.*, Southern District of New York.

Affirmed.

ERNEST ALLEN COHEN (Jaffe Cohen Berman & Crystal, New York, N. Y. on the brief), *for plaintiff-appellee.*

IRWIN M. TAYLOR (Kaufman, Taylor, Kimmel & Miller, New York, N. Y. on the brief), *for defendant-appellant.*

Appendix A

LUMBARD, *Chief Judge*:

This appeal presents the difficult question of whether the appellant's article, "'Happiest Mother' Kills Her Three Children and Herself," was sufficiently untruthful and offensive to support a judgment for invasion of privacy.

In September, 1963, Melvin Varnish's wife killed their three infant children and committed suicide. In March, 1964, Best Medium Publishing Co., Inc. published an article in its weekly, *The National Enquirer*, purporting to describe Varnish's actions and reactions in connection with this tragedy.[1] The article was based upon previous news-

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[1] The article read as follows:

Mrs. Joanne Varnish was known as the happiest woman in the neighborhood.

She was young, pretty, had a good husband and three lovely children.

She was bright, cheerful and completely devoted to her family. Things always ran smoothly in the Varnish household.

So smoothly that more than one neighbor in their Concord, Calif., community said:

"Now, there's a model family. They're always so happy and contented and she's the happiest mother in the neighborhood."

Each week Mrs. Varnish 25, looked forward to going bowling with her husband, Melvin, 30, a successful auto salesman. They had been having fun doing it for years.

Then last November 27, their regular weekly bowling night, she told her husband that she didn't feel like going bowling, that she'd rather stay home for a quiet evening.

Then she said to him: "But you go along, dear, and have a good time.

"And don't worry about us, we'll all be fast asleep when you get home."

Varnish kissed her and left.

At 1 a.m. he returned home—and found the house empty.

He was racing through the house when he heard music coming from the garage.

He dashed to the garage. The music was coming from the car radio. He also found his wife and three children—Debra, 5, Mitchell, 4, and Danny, 20 months.

Mrs. Varnish had been right.

She and the children were all fast asleep—forever.

paper reports and police records which the author, James Donahue, had collected. On the basis of this article, plaintiff commenced this diversity action in the Southern District for invasion of privacy, claiming that the portrayal of his wife and his relationship with her was a complete fictionalization, invented by the defendant to give the story an ironic and sensational twist, and that the publication was offensive to community standards of decency. He alleged that the article caused him severe mental distress, loss of job opportunities and loss of friends.

The case was tried before a jury, which, after an instruction to which appellant made no objection, awarded

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Mrs. Varnish had attached a vacuum cleaner hose to the exhaust on the family car and then sat the children in the car.

She put the other end of the hose through a partially open window and then got in the car to wait for the fumes to put them all to sleep.

Danny was in the front seat with his mother.

Cuddled together in the back seat were Debra and Mitchell.

Varnish's anguished screams when he came upon the tragedy awakened the neighbors, and called the fire department.

Firemen worked vainly to revive them and then rushed them to a hospital.

While doctors continued desperate efforts to revive the mother and children, police found a note left by Mrs. Varnishfor her mother. It said:

"Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on."

It was an explanation that explained nothing least of all to the shocked Varnish.

He said: "I can't understand it. We had no troubles, no troubles at all. We were happy."

Three hours after the discovery of the tragedy, doctors finally gave up and pronounced the mother and children dead.

Varnish broke into tears, went from child to child, kissed each on the head and sobbed:

"We'll have to forgive her. We'll have to forgive her."

But it would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself.

plaintiff $5,000 compensatory[2] and $15,000 punitive damages. On appeal, appellant contends that there is insufficient evidence to support a finding of invasion of privacy under Pennsylvania and federal law,[3] and that therefore its motion for a directed verdict or its motion for judgment notwithstanding the verdict should have been granted. As we find appellant's contentions to be without merit, we affirm the judgment.

Although Pensylvania permits a tort action to redress unwarranted invasions of privacy, *Aquino* v. *Bulletin Co.*, 190 Pa. Supr. 528, 154 A. 2d 422 (1959), it recognizes that privacy actions must be carefully scrutinized in order to avoid interference with First Amendment guarantees of freedom of speech and press. *Aquino* v. *Bulletin Co., supra,* 154 A. 2d at 425; *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (3d Cir. 1958), cert. den. 357 U. S. 921. Likewise, in *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967), the United States Supreme Court held that First Amendment guarantees of speech and press forbid recovery, absent a showing of "knowing falsity or reckless disregard for the truth," in privacy actions involving "matters of public interest." While the scope of "matters of public interest" has not been clearly defined, it cannot be doubted that the subject of the Enquirer article, a murder-suicide, is within that category. Cf. *Time, Inc.* v. *Hill, supra,* 385 U. S. at 388; *Jenkins* v. *Dell Publishing Co., supra,* 251 F. 2d at 450-52;

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[2] Plaintiff at trial introduced evidence that as a result of the article he attempted suicide, suffered the need for psychiatric attention, suffered unemployment, was shunned in his community, and became the victim of severe mental suffering. Thus, there was ample evidence to support the jury's finding of compensatory damages. Cf. *Diapulse Corp.* v. *Birtcher Corp.*, 362 F. 2d 736 (2d Cir. 1966), cert. den., 385 U. S. 801.

[3] Since plaintiff was a resident of Pennsylvania at the time of the publication, the parties agreed that Pennsylvania law should apply. To the extent that freedom of the press is involved federal law is of course also relevant.

Restatement (2d) Torts §652 F (Tent. Draft No. 13, 1967). Thus it was incumbent upon the plaintiff to establish that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth. After a review of the entire record, we conclude that there was ample evidence for the jury to find, as it did, that the plaintiff has met this burden.

Appellant claims that there was no evidence that its article was false in any material respect. However, plaintiff contended at trial, as he does here, that the story cast him in a false and unfavorable light, that the "happy wife and mother" theme used throughout the article was fictitious and was intended to be ironic, to indicate plaintiff's insensitivity and lack of caring and understanding for his wife. The record shows that Mrs. Varnish, far from being the happiest mother, was in reality a despondent, depressed and extremely unhappy woman. The suicide note, which itself expressed her extreme unhappiness and which was in the author's possession, was quoted in the article in a somewhat distorted manner:

> ". . . police found a note left by Mrs. Varnish for her mother. It said:
>
> 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'
>
> It was an explanation that explained nothing, least of all to the shocked Varnish."

The actual note in fact explained the suicide more fully:[4]

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[4] Although appellant argues that only part of the letter was quoted because Donahue wanted to write a "nice story," it is apparent that had the entire note been printed, the "happiest mother" approach, the selling point, would have been impossible.

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I can't go on any longer. I see no future for the children or myself. Mitch [plaintiff] is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961. . . . I owe so much I'll never have to bother anyone anymore."

The article also stated that "more than one neighbor" had said that Mrs. Varnish was the "happiest mother in the neighborhood," whereas the two neighbors' statements which were available to the author merely stated that the Varnishes "seemed to get along fairly well." The story also contained fictionalized dialogue and some minor inaccuracies. It concluded:

> " . . . it would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself."

Plaintiff at trial testified that his wife was not a happy person; he repeatedly testified, however, that he understood her and her problems, that they had a difficult life and that he did what he could for her.

We agree with the appellant that minor inaccuracies and fictionalized dialogue will not alone defeat the privilege granted to truthful publications of public interest. Cf. *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324 (1966), vacated and remanded, 387 U. S. 239, rearg., 21 N. Y. 124 (1967), probable jurisdiction noted, 37 U. S. Law Week 3133 (Oct. 14, 1968); *Koussevitzky* v. *Allen, Towne & Heath.*

Appellant also argues that there was no showing that the article was offensive to persons of ordinary sensibilities, as required by Pennsylvania law. Pennsylvania has held, however, in a case quite similar to this one, that this issue is peculiarly within the competence of the jury. *Aquino* v. *Bulletin Co., supra,* 154 A. 2d at 430. We cannot say as a matter of law that the Enquirer article would not be offensive to a person of ordinary sensibilities.

Were we to hold, as the appellant urges, that on this record the plaintiff was not entitled to recovery, there would be insufficient restraint on reckless, irresponsible, and untruthful journalism under the guise of freedom of the press. We think that the standards applied by the district court, which required intentional or reckless falsity and offensiveness to persons of ordinary sensibilities, represent a proper balancing of the public interest in freedom of expression and the individual interest in privacy.

The judgment is affirmed.

HAYS, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court. I cannot agree with the majority's conclusion that the Enquirer article is materially false.

Plaintiff's entire argument rests, as the majority indicates, on the theory that the story portrayed him in a false and unsympathetic light by implying that he was lacking in sensitivity and understanding. He objects particularly to the statement in the article that he did not understand why his wife had killed herself. But plaintiff testified that he did not understand why his wife had killed herself and that he could not swear that he had not told the investigating police about his inability to understand.

If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light.

The irony of the description of the wife as happy cannot properly be held to justify withdrawal of constitutional protection.

Even if it be assumed that the article contains some false statements and that they were published knowingly or recklessly, there is nothing in the statements as to the plaintiff which is so offensive as to justify the verdict. That the article is in bad taste is not sufficient. It clearly does not go "beyond the limits of decency," as it must if plaintiff is to recover. See *Aquino* v. *Bulletin Co.*, 190 Pa. Sup. 528 (1959).

The news media must be allowed wide leeway in deciding what they will report and how they will report it. See *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

APPENDIX B

Memorandum Opinion by MacMahon, *D.J.*

(R. 524) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MACMAHON, *District Judge.*

Viewing the evidence in a light most favorable to plaintiff, there clearly was an issue of fact as to which reasonable men might reasonable differ which required denial of defendant's motion for a directed verdict made at the close of plaintiff's case and renewed at the close of the entire case. We also conclude that there was sufficient evidence as a matter of law to justify the jury's verdict and its award of compensatory and punitive damages.

The parties stipulated that the case would be governed by Pennsylvania law. The court's charge to the (R. 525) jury was therefore based on *Acquino* v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959), as we believe the rule there enunciated would be modified by *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), *Time, Inc.* v. *Hill,* 385 U.S. (1967), and *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Clearly there was sufficient evidence for the jury to find that defendant's pubication did use the plaintiff's name and personality without his consent, that defendant's article was substantially false, that defendant either knew that the published article was substantially false or published it with

reckless disregard of its truth or falsity, that the defendant should have realized that the article would offend a person of ordinary sensibilities and outrage the community's sense of decency, that plaintiff did suffer damages as a proximate result of the publication, and that defendant's conduct was so wanton and reckless as to be without regard to the rights of the plaintiff or people in general. These facts clearly warrant both the jury's verdict in favor of the plaintiff and its award of compensatory and punitive damages. See *New York Times Co.* v. *Sullivan, supra*, as to compensatory (R. 526) damages, and *Curtis Publishing Co.* v. *Butts, supra*, as to punitive damages.

Under the circumstances, the jury's award of $5,000 compensatory damages is reasonable, and its award of $15,000 punitive damages is not excessive. The jury could reasonably conclude, in view of a finding of outrage to the community's sense of decency, that publication of such stories and pseudo-reporting should be penalized in order to curtail repetition of the practice in the future.

Accordingly, defendant's motion for a judgment in accordance with its motions for a directed verdict and for judgment notwithstanding the verdict is denied. The Clerk is directed to enter judgment for the plaintiff in accordance with the jury's verdict.

So ordered.

Dated: New York, N. Y.
March 14, 1968

/s/ LLOYD F. MACMAHON
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

v.

MELVIN VARNISH,

Respondent.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

v.

MELVIN VARNISH,

Respondent.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below and Jurisdiction

The opinions below and the basis of jurisdiction are as set forth in the Petition.

Constitutional Provisions Involved

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Questions Presented

1. Do there exist such special and important reasons for the granting of a writ of certiorari in this case as to cause this Court to exercise its sound judicial discretion by granting a writ of certiorari?

2. Whether, viewing the evidence in the light most favorable to the respondent (hereinafter "Mr. Varnish") and giving Mr. Varnish the benefit of every inference favorable to him which the evidence fairly supports, reasonable men may draw different inferences and reasonably differ with respect to any one or more of the following issues:

(a) Whether the article in so far as it related to Mr. Varnish was substantially false, distorted or fictionalized.

(b) Whether the petitioner (hereinafter "Best") would outrage the sensibilities of an ordinary person in whether Best acted in reckless disregard of the truth or falsity, distortion or lack of distortion, or fictionalization or lack of fictionalization.

(c) Whether the falsity, distortion or fictionalization know of the falsity, distortion or fictionalization or the position of Mr. Varnish and whether Best could reasonably foresee that it would do so.

(d) Whether Mr. Varnish was damaged by the falsity, distortion or fictionalization and was there a basis for the award of exemplary damages.

Statement

The present Petition calls upon this Court to review by writ of certiorari findings of fact made by a trial jury receiving proper instructions as to the law. The charge of the Court is set forth in the transcript* on pages 157-172a. On transcript page 174 on line 11, Mr. Taylor, on behalf of Best, stated that he had no exceptions to the charge to the jury. Even in its present Petition, no objection is raised to any aspect of the charge to the jury which in all respects conformed to recent and repeated decisions of this Court. Moreover, no objection was raised in the Second Circuit or in the Petition to this Court to any ruling made during the course of the trial below. Thus, this Court is now asked to devote its time and energies to evaluating the factual determinations unanimously reached by the jury in this case.

The petition for a writ of certiorari thus is based upon the affirmance of a verdict by a jury based upon a charge to which Best had no exceptions (tr. p. 174). Moreover, no objection appears to be raised by Best to any ruling or determination by the Court below other than its denial of motions by Best for a directed verdict and for judgment non obstante verdicto. Thus, the only possible issue for this Court to decide should it grant a writ of certiorari, is whether the trial Court acted legally ni permitting the jury to deliberate and determine the issues in this case on the basis of the record below. The record shows substantial deliberation by the jury in this matter (tr. pp. 174a, 182) before reaching a unanimous verdict for Mr. Varnish (tr. pp. 182-183).

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* References to the Transcript are designated "tr.".

The action was based exclusively on the tort of invasion of privacy as provided under the laws of the Commonwealth of Pennsylvania where Varnish lived on March 8, 1964 when Best published in its publication "The National Enquirer" and widely circulated a writing set forth in Appendix A, footnote 1 pp. A2-A3.**

The writing deals with Mr. Varnish, refers to him by name and purports to describe his actions and reactions in connection with a tragic incident in which his wife killed herself and their three young children on September 27, 1963. Mr. Varnish discovered the bodies upon returning home that night. A Sheriff's Report was issued in connection with the deaths and was introduced in evidence as plaintiff's Exhibit 2 in the trial Court.

It was established at the trial that Best's only sources of information concerning the event where the Sheriff's Report and two articles published immediately after the event (tr. pp. 113-116). Best admitted that it had made no attempt whatsoever at independent verification, that it did not seek to interview Mr. Varnish, any neighbors, any Sheriff's Deputies or "any person with knowledge" (tr. p. 116). It will be shown that none of the sources used by Best in any way substantiate the fundamental premises of the article and that they are false and fictionalized and were published with knowledge that they were false and in reckless disregard of the truth.

The action had originally been instituted in the Western District of Pennsylvania but had dismissed solely on the procedural ground that Best was not amenable to service in that district. The action was then brought in the Southern

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** References to Appendix A refer to Appendix A to the petition.

District of New York where Best conducts its principal business operations. A motion by Best to dismiss the complaint was denied by Judge Feinberg and a motion by Best for summary judgment, brought after examination before trial of Mr. Varnish, was denied by Judge Croake. The motions for directed verdict and judgment non obstante verdicto were denied by Judge MacMahon (Appendix B pp. B1-B2). All motions were fully briefed by both sides as was the appeal to the Court of Appeals for the Second Circuit.

Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was conferred upon the district court by 28 U.S.C. §1332(a)(1).

Reasons for Not Granting the Writ

Rule 38 of this Court, Sub-Section 5, makes it abundantly clear that a writ of certiorari will be granted "only where there are special and important reasons therefor." It is clear that a review on a writ of certiorari "is not a matter of right, but of sound judicial discretion." Thus, Sub-Section 5 indicates the character of reasons that will be considered by this Court in granting certiorari. Sub-Paragraph (b) of Sub-Section 5 deals with decisions rendered by a Circuit Court of Appeals and states:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions;

> or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

None of these instances are here present. The decision of the Court of Appeals for the Second Circuit in no way conflicts with any decisions of other Circuit Courts of Appeals; it in no way involves questions of local law which in any way conflict with applicable local decisions; and the important question of federal law which was involved in this case has been fully settled by this Court by recent decisions. The decision of the Second Circuit in no way conflicts with the applicable decisions of this Court no has it departed from the accepted and usual course of judicial proceedings nor has it sanctioned a departure by the lower Court requiring the exercise of this Court's power or supervision.

No claim is made that the basic rules limiting the right of privacy insofar as they are applicable to publications is not an important question of federal law. Nonetheless, this issue is not in dispute in this case inasmuch as the Court below carefully spelled out in its charge to the jury. The governing principles heretofore carefully developed by this Court do not eliminate the right of privacy but instead condition it upon the establishment of certain facts. In this case, some evidence was presented to the jury with respect to each of the facts required to be established in order to establish the cause of action. In fact, the Petitioner makes no claim that the elements of invasion of privacy were not

properly explained to the jury but claims merely that the facts before the jury were insufficient to enable a jury to find these elements. There is no question that the jury might have agreed with the Petitoner's version of the facts, as the record contains considerable conflicting evidence and testimony. That is not, however, the test of whether or not a jury verdict is permitted to stand. Under Amendment VII to the United States Constitution, a jury verdict must not be interfered with where reasonable men may reasonably differ with respect to the evidence. Moreover, as will be shown, Appellate Courts must view the evidence in a light most favorable to the party obtaining the jury verdict and must given him the benfit of every inference favorable to him which the evidence fairly supports. It is clear that it is the trial judge who is in the best position to determine whether there was sufficient evidence to enable a jury to reach a verdict. It is clear that it is not the primary function of this Court to oversee that function particularly where there has been a intermediate appeal. There is no general guidance which will be offered by a determination in this case. The principles of law are well defined both as to the limitations imposed by the First Amendment on a cause of action for invasion of privacy and the scope of the Seventh Amendment with regard to a review of a jury determination. This case embarks on no new direction in either area and a determination by this Court would be purely a factual one based on the evidence in this particular case and giving no general guidance in any future case.

ARGUMENT

POINT I

Viewing the evidence in a light most favorable to Mr. Varnish, there clearly was an issue of fact as to which reasonable men might reasonably differ which required denial of Best's motion for a directed verdict made at the close of Mr. Varnish's case and renewed at the close of the entire case. There was sufficient evidence as a matter of law to justify the jury's verdict and its award of compensatory and punitive damages.

Although a variety of formulations have been established by various authorities as to the basis upon which the granting of a motion for a directed verdict or a motion for judgment notwithstanding the verdict may be permissible in view of the Seventh Amendment to the Constitution and the provisions of Rule 50 of the Federal Rules of Civil Procedure, the cases are uniform in seeking to uphold the jury verdict unless the facts were such that reasonable men could not differ. 5 Moore's Federal Practice ¶50.02, ¶50.07 [2] (2nd Edition 1951). Moreover, all inferences which could have reasonably been drawn from the facts in favor of the verdict of the jury are indulged in even though other inferences might reasonably be drawn which are contrary, *Continental Ore Co.* v. *Union Carbide,* 370 U.S. 690, 696 (1962); *Wilkerson* v. *McCarthy,* 336 U.S. 53 (1949) and which are more persuasive to the Court, *Compton* v. *United States,* 377 F. 2d 408 (8th Cir. 1967). Furthermore, where facts are controverted, the Court must disregard the facts and inferences which would impeach the verdict provided there are facts or inferences upon which reasonable men could have concluded as did the jury in the case under consideration.

In *Simpson* v. *Skelly Oil Company*, 371 F. 2d 563 (8th Cir. 1967), the Court said at page 567:

> "The standard applicable to consideration and disposition of a motion for a directed verdict or for a judgment N.O.V. *is whether plaintiff's evidence is sufficient to support a burden, ignoring defendant's evidence.* (Emphasis added)

The facts in this case with respect to each of the four elements of Mr. Varnish's cause of action as outlined by the Court in its charge to the jury justify the conclusions reached by the jury in this case.

1. Falsity, Fictionalization or Distortion

It has been shown and cannot be disputed that the trial court was required to view whatever evidence there is in the light most favorable to the party against whom the motion for a directed verdict and for judgment non obstante verdicto is made. As has been shown, this rule requires the Court to disregard *all* evidence favorable to Best and to consider *only* the evidence favorable to Varnish.

Nonetheless, in its Petition, Best prceeds to carefully martial all possible evidence in its favor and to totally ignore or minimize any meaningful evidence in favor of Mr. Varnish, as a smoke screen against the abuses established by Mr. Varnish to the satisfaction of both Courts and the jury below.

Inasmuch as the jury is entitled to draw reasonable inferences from the facts, it is entitled to evaluate the words in the context in which it reasonably finds that they have been used. Thus the word "happiest" could reasonably have been determined to have been used for the purpose of

creating a false, distorted picture of Mr. Varnish by placing him in an ironic circumstance rather than in the tragic circumstance which was thrust upon him.

Moreover, it is apparent that it is not the description of his wife of which Mr. Varnish compains, but the repeated statements in the article that Mr. Varnish himself could not "understand why the happiest wife and mother in the neighborhood suddenly decided to kill her 3 children and herself." It is the false impression given about Mr. Varnish and his role as husband that is a permissible inference which the jury could draw from the false statements about *his* lack of understanding of *his* "happy wife" (See e.g. tr. pp. 26-27, 69, 81-82).

The jury was also permitted to draw an inference that the quotation from the suicide letter constituted a distorted picture of what was actually written in the suicide note (compare quotation from article set forth at Footnote 1 to Appendix A p. A3:

> ". . . police found a note left by Mrs. Varnish for her mother. It said:
>
> > 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'
>
> It was an explanation that explained nothing, least of all to the shocked Varnish."

with actual letter set forth at Appendix A p. A6:

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I can't go on any longer. I see no future for the children or myself. Mitch is impossible and this is the only way to get away from him. I've

> had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961. I didn't forget, but just never had the chance to pay it back. Also tell Marilyn I wanted to pay back the money that her and Stan helped us with, and of course, yourself. I owe you so much I'll never have to bother anyone anymore."

Again it is not the mere distortion of the contents of the suicide note but the attempt to tie Mr. Varnish and his alleged lack of understanding to this distortion. Thus, a partial and unrepresentative quotation of the suicide note is followed by a paragraph stating "It was an explanation that explained nothing, *least of all* to the shocked Varnish" (emphasis supplied) (Appendix A p. A3). Thus, again Mr. Varnish is portrayed as lacking in understanding of the circumstances of his "happy wife." And on this occasion he is described by the article as having the least knowledge or understanding of anyone.

Best's petition minimizes Mr. Varnish's repeated statements that he understood his family, that he knew his wife, that he understood his circumstances, and that the note constituted an explanation to his that he above anyone else could understand (tr. pp. 26-27, 69, 82).

The jury had a right to accept that testimony as true and to disregard any testimony to the contrary, particularly in view of the emotional state of Mr. Varnish during cross examination.

Regarding the significance of the "happiest mother" approach which pervaded the article, Best's witness Donahue admitted that the story was constructed in this manner at

the direction of an editor of the Enquirer who, the jury could reasonably infer, had no knowledge whatsoever concerning the incident (tr. pp. 117, 123-124). The article contains a headline running the full width of the page of the newspaper beginning "Happiest Mother." The picture of Mrs. Varnish is captioned in boldtype "Happy Mom." The first four paragraphs all deal with the conception of Mrs. Varnish as the "happiest mother" and the article concludes by referring to Mr. Varnish's lack of understanding concerning his "happiest" wife (see Appendix A pp. A2-A3).

One searches in vain for anything in the Sheriff's Report or in other articles indicating that Mrs. Varnish was the happiest woman in the neighborhood, or was known as the happiest woman in the neighborhood, or could be called anything but a quiet, despondent, depressed and tragic woman (see plaintiff's exhibit 2 in trial court.)

The jury could conclude as did the reporting officer on page 6 of plaintiff's Exhibit 2 in Trial Court "Apparently and from indications and also from a note left by Mrs. Varnish, . . . she became quite despondent over family conditions and was unable to go on any further."

The jury was entitled to give credence to Mr. Varnish's detailed statement on the fourth page of plaintiff's Exhibit 2 in Trial Court of the problems which existed in his family. From this statement the jury could infer an understanding which it could reasonably conclude conflicted with any attempt to portray the tragedy as high irony.

No source whatsoever was cited or found for the statement set forth in paragraphs 4 and 5 of the article which purport to quote "more than one neighbor" (Appendix A

p. A-2). The jury was entitled to infer from Mr. Donahue's statements that he simply made it up to sell newspapers (see e.g. tr. pp. 120-122, 130-131). Moreover, the Sheriff's Report demonstrates that even the neighbor who lived next door to the Varnishes and the neighbor who lived directly across the street from the Varnishes each did not know the family "too well" (plaintiff's exhibit 2 in Trial Court). This fact is further amplified by the statement on page 4 of of the Sheriff's Report that the Varnishes had been living in their home only since August 13th. It was established that the tragedy occurred on September 27th, not November 27th as the article erroneously stated. Thus, Mr. Varnish lived in the neighborhood for a brief period of less than a month and a half and Mrs. Varnish was relatively unknown even to her closest neighbors (see e.g. tr. pp. 36-37).

The jury could infer that Best also created intimate and morbid pictures without basis. Thus, the article states, "Varnish broke into tears, went from child to child, kissed each on the head and sobbed: 'We'll have to forgive her. We'll have to forgive her.' " (Appendix A p. 3.) These statements do not appear in the Sheriff's Report; they do not appear in any other article; they are complete fictionalization concerning the most intimate action of Mr. Varnish at the maximum moment of personal bereavement.

Thus it has been shown that it was not merely the false picture portrayed of Mr. Varnish's wife but the false painting of Mr. Varnish into this false picture which the jury was entitled to infer from the evidence before it.

2. Reckless Disregard of Truth

The state of mind of Best in publishing the distortions referred to previously is a question uniquely appropriate

for jury determination. See, e.g. *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963). It has been established that the jury could reasonably conclude that the entire incident was slanted by Best to create a picture of irony. This plus the reckless assertion of Mr. Varnish's lack of understanding and the depicting of intimate details for which there is no basis in any of the sources used by Best, clearly justified an inference of reckless disregard of truth or falsity.

Could the jury infer that Best would print any distortion which would maximize its sale of newspapers without any attempt to verify its facts or without checking with the neighbors or with the police, or with Mr. Varnish, or with any member of his family? It is apparent that an inference of recklessness is permissible under these circumstances (See tr. pp. 105-131).

3. Outrage to the Sensibilities of Ordinary Persons

Acquino v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A. 2d 422 (1959) which both parties recognize as the principal authority defining the law of privacy in Pennsylvania, makes clear that community outrage is a question for a jury and that their determination is not to be disturbed. This jury deliberated for over six hours and requested instruction on this precise point on two separate occasions. The jury here was entitled to conclude that the false, distorted, and fictionalized portrayal of Mr. Varnish could outrage the sensibilities of ordinary persons and that this outrage was foreseeable by Best.

The subject matter of this tragic event, if Best was even entitled to deal with it five and one half months later, cried

out for factual and straightforward treatment. Instead, the jury could reasonably conclude that it was converted into a morbid circus.

4. Damages

In 1966, the Second Circuit confirmed the long standing rule that a Court could not lightly displace the jury in determining the quantum and applicability of both compensatory and punitive damages. *Diapulse Corporation of America* v. *Birtcher Corporation,* 362 F.2d 736 (C.A. 2d Cir. 1966) *cert. denied,* 385 U.S. 801.

That action for libel was based on allegedly false statements that plaintiff's diathermy machinery was worthless. The jury awarded plaintiff $50,000.00 compensatory damages and $75,000.00 punitive damages. On appeal, the Court held the trial judge did not abuse his discretion in failing to order a remittitur. Quoting from *Dagnello* v. *Long Island R.R. Co.,* 289 F.2d 797 (2d. Cr. 1961) and *La France* v. *New York, N.H. & H. R.R. Co.,* 292 F.2d 649 (2d Cir. 1961), the Court held that the test is whether the amount is so high that it would be a *denial of justice* to permit it to stand, and that the Court would modify a verdict only when the "*jury awards something fantastic*" for the harm involved:

> ". . . the jury's award of compensatory damages of $50,000 cannot be described as 'fantastic' or as a 'denial of justice.' The same is true of the $75,000 award for punitive damages . . . The ward may be viewed as reflecting the moral sense of the community and its desire to prevent repetition of this wrong . . ."

Damages are allowed for mental anguish alone:

> "Substantial damages for injured feelings and mental anguish alone may be recovered for a wrongful

> invasion of the right of privacy and it is therefore not necessary to allege or prove special damages i.e. actual pecuniary loss or expenses, in order to sustain a recovery." *Hofstadter* v. *Horowitz*, The Right of Privacy, 259 (1964). See also *Kunz* v. *Allen*, 102 Kans 888, 172 Pac. 532 (1918). ("The principal ground upon which it is claimed the demurrer was sustained is that the plaintiff failed to prove any actual damages. This was not necessary."); *Brents* v. *Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) ("He is entitled to recover substantial damages, although the only damages suffered by him resulted from mental anguish. The fact that damages cannot be measured by a pecuniary standard is not a bar to his recovery.')"

Once the jury found reckless disregard of truth and the publication of a false, distorted, fictionalized version of a tragic incident, the award of a $20,000.00 verdict can hardly be deemed excessive where there is evidence that, as a result of the article, Mr. Varnish attempted suicide (tr. p. 33), suffered the need for psychiatric attention (tr. p. 31), suffered unemployment (tr. p. 32), was shunned in his community (tr. p. 33), and became the victim of severe mental suffering (tr. pp. 31-36).

Although it should not be necessary for this Court to consider the substantive basis for the jury verdict in that Best made no exception to the Charge to the jury, nonetheless, Best has traveled so far afield in its petition that it may be well to summarize the law with respect to invasion of privacy simply to provide some perspective.

Invasion of privacy inherently involves a delicate balancing of freedom of the press against the right of an indi-

vidual to be left alone. Thus the following elements have been considered in arriving at the balance:

1) The nature of the subject, including whether the subject is a public figure by choice or a normally obscure person. See e.g. *Acquino, supra; Sutton* v. *Hearst*, 277 App. Div. 155, 98 N.Y.S. 2d 233 (1st Dep't. 1950);;

2) The nature of the publisher, including the type of publication sold by the publisher and the purpose and intent of the publisher in making the disclosures concerning the subject. See, e.g. *Acquino, supra; Binns* v. *Vitagraph Company*, 210 N.Y. 51; *Annerino* v. *Dell Publishing Co.*, 117 Ill App. 2d 205, 145 N.E. 2d 761 (1958);

3) The nature of the article, as to whether it is accurate, fictionalized, fanciful, dramatized or straight-forward, the intimacy of the subject, the necessity of publisher's use of subject's name or description in order to convey the meaning of the article and whether the nature of the article is such as to result in subject's being held in a bad light or being severely embarrassed or otherwise injured. See e.g. *Acquino, supra; Sutton, supra; Garner* v. *Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951);

4) The nature of the information including the significance of the information, the currency of any aspect of the situation, and the justification for public interest in the information. See e.g. *Wagner* v. *Fawett Publications* No. 13541 [Seventh Circuit, June 18, 1962, discussed in the Right of Privacy: normative-descriptive confusion in the defense of newsworthiness, 30 Chicago L. Rev. 722, 726-727 (1963)]. The *Wagner* case concerned the publication of stories of the rape-murder of plaintiff's young daughter,

two months after the crime occurred. The Seventh Circuit reversed the District Court and held the publications actionable. The Court said:

> "Addressing ourselves to Fawcett's attack upon the complaint on the ground that matters set forth in its publication were newsworthy, of great public interest, and designed to inform and educate its readers, we are of the opinion that the trier of facts could find the articles in question, published months after the death of Mary-Lou Wagner and had ceased to be news and for that reason these articles were not published in news media but in magazines sold for the entertainment of their readers. By our holding we in no way suppress the legitimate publication of news; rather we condemn the pursuit for commercial purposes of those who may have been connected with matters which were, at the time of the occurrence, newsworthy. When the news media have served their proper function in reporting current events, private individuals involved therein sink back into the solitude which is the right of every person. That solitude involves a privacy which no publication has the right to thereafter invade solely for the purpose of selling to its readers lurid accounts of tragedy."

The Court reversed itself "solely on the ground that the events in question actually wer still current," reaching this decision on rehearing "on the basis of evidence showing that legal proceedings were taking place against the accused at the time of publication. The rule stated in the original opinion regarding decisive effect of the time lapse seems to have remained intact, limited only by the condition that the sequence of newsworthy events stemming directly from the original events would have come to an end." (30 Chicago L. Rev. *supra* at page 727).

5) The nature of the injury, including the foreseeability to the publisher of injury to the subject and the intensity of the actual injury suffered by the subject. See e.g. *Melvin* v. *Reed*, 112 Cal. 285, 297 Pac. 91 (1931).

The jury thus acted in accordance with the traditional and classic learning in this case where Mr. Varnish is normally an obscure individual who has never sought to become a public figure, and where Best has consistently engaged in catering to the sensational and the morbid, with almost no redeeming educational value, and where the article is fictionalized, dramatized and false, and deals with the most intimate acts, words and feelings of Mr. Varnish at a time of deepest shock and bereavement, and unnecessarily uses Mr. Varnish's name and description where almost no element of public significance can be shown with respect to the information, and where absolutely no currency exists with respect to any aspect of the situation, and where the injury to Mr. Varnish was intense and easily foreseeable by Best.

It is interesting to contrast this case with the leading Pennsylvania case, the *Acquino case, supra*:

In the *Acquino* case *supra*, the Pennsylvania Court relying upon the *Sutton* case, *supra* upheld a jury verdict against a legitimate newspaper, the Philadelphia Bulletin. In that case, the plaintiffs' daughter was married without their knowledge before a Justice of the Peace. The groom refused to engage in a church marriage and informed his bride that he had only married her to spite her parents. The plaintiff's parents caused the marriage to be dissolved. The newspapers reported the granting of the divorce as a current news item and, of course, no invasion of privacy occurred as a result. Nonetheless, 18 days after the Court

opinion in the divorce case, the Philadelphia Bulletin published a feature story which, like the story complained of in this case, included photographs and a headline in large letters across the page. The story, like the story in this case, gave the full names of subjects and specified the street where they lived. As in this case, the author permitted his imagination to roam through the facts, although, of course, his imagination could not conjure up such perverse pictures as kissing dead babies, as were conjured up by the author in this case. The Court held that even though the article about the marriage and divorce was based upon a newsworthy event, it constituted an invasion of privacy because its purpose was not to report past or current news of public interest, but to amuse and astonish the reading public. The *Acquino* case has become the leading case in Pennsylvania on the question of right of privacy. (See Patterson, Privacy: A Summary of the Past and Present, 35 Penn. Bar. Assoc. Quarterly 52 (1963)).

CONCLUSION

It has been shown that granting of a writ of certiorari would appear uniquely inappropriate in this case involving no dispute as to any governing principles of law. A decision by this Court in this case would offer no guidance to Courts in other cases in determining when the facts in each of those cases would justify permitting a jury to make a determination rather than removing the case from the jury. It would merely indicate the adequacy of the proof in this particular case. The kind of proof required in cases of this nature has been clearly defined by this Court and was properly applied by the Court in its charge to the jury as to which no exception was raised by the petitioner.

Moreover it has been shown that even if a writ of certiorari were to be granted, the decisions of the Courts below would be required to be upheld.

A conscientious jury has weighed and evaluated an article published by Best about Mr. Varnish, the facts before Best when it wrote the article, and the consequences of that article to Mr. Varnish. There was before it substantial evidence justifying reasonable men in concluding that Mr. Varnish's privacy had been invaded to his damage. The verdict of the jury should not be disturbed and the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

—v.—

MELVIN VARNISH

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

The reasons for granting the writ come well within Rule 19.

The respondent urges this Court not to grant petitioner writ of certiorari on the ground that the petition presents none of the specified reasons as set forth in Rule 19 of the Supreme Court Rules (42 F.R.D. 81, 94-95, formerly Rule 38). Rule 19 defines the circumstances under which this Supreme Court, in its discretion, may find it appropriate to grant a review on writ of certiorari. It provides that this Court may grant review when a court of appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this court; . . . ."

The principal thrust of petitioner's main brief is that petitioner's constitutional rights have been violated by the holding below which construed its published article to

be an invasion of respondent's right of privacy. Petitioner has urged in its main brief (pp. 13-22) that the record of this case fails to prove that the alleged offending article (a) was materially false as to respondent and (b) was motivated by calculated malice on the part of the petitioner. It is respectfully submitted that the court of appeals below has decided a federal question involving the petitioner's constitutional right of freedom of press under the First Amendment in a way which conflicts with the prior decisions of this Court in that the proof adduced below has patently failed to meet the standard for defeasance of petitioner's constitutional rights under the First Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Furthermore, it has been urged in petitioner's main brief (pp. 8-9) that the Court of Appeals below has rendered a decision concerning an important state law in conflict with the present applicable state law of Pennsylvania. Thus, the Court below has held that purportedly false statements about the respondent's deceased wife constitutes an invasion of respondent's privacy which is, in fact, in conflict with the holding of *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422, 430 (1959). *Aquino* explicitly held that an action for invasion of privacy under Pennsylvania law is a personal action and that a publisher is only liable for what it related about a plaintiff and not what it related about some third party.

A further reason to be considered by this Court is the rendition by a court of appeals of a decision ". . . in conflict with a decision of another court of appeals on the same matter; . . .". The petitioner's main brief (pp. 10-13) urges that the holding of the Court of Appeals below rep-

resents a conflict with the holding of the Court of Appeals for the Third Circuit in the case of *Jenkins* v. *Dell Publishing Co.*, 251 F.2d 447 (3rd Cir., 1958), cert. den. 357 U.S. 921 (1958).

Finally, the itemization in Rule 19 of the various reasons to be considered by this Court in granting review on certiorari does not limit the exercise of this Court's discretion to the enumerated reasons. As the Rule expressly states, the denoted reasons are not controlling nor do they fully measure the Court's discretion, but, rather, the granting of review is an exercise of sound discretion when there are special and important reasons therefor.

It is respectfully submitted that there could hardly be any more important reason for granting certiorari than in the present case where the instant decision of the Court of Appeals below effects such a serious erosion of a fundamental liberty—that of freedom of the press.

II

A jury verdict impinging upon the right of free press is subject to scrutiny by this Court, particularly where the record discloses an absence of substantial evidence to meet established criteria for its defeasance.

Respondent urges that this Court may not interfere with the jury verdict rendered below by reason of Amendment VII of the United States Constitution. Petitioner has no quarrel with the general proposition that, upon a motion for a directed verdict and for a judgment n.o.v., the trial court was required to view the evidence in a light most favorable to the party against whom such motions were made. Nevertheless, there still remains a burden upon that

party to adduce substantial evidence to meet the legal criteria which this Court has prescribed in its recent decisions of *Time, Inc.* v. *Hill, supra; New York Times, Co.* v. *Sullivan, supra,* and *St. Amant* v. *Thompson, supra.* This burden was never sustained.

The petitioner's brief has catalogued the testimony of the respondent with respect to the standard of material falsity, (pp. 3-5). Nothing publishing about *him* by the petitioner was materially false. Instead, he has urged that the description of the late Mrs. Varnish as "the happiest mother" produced a false and distorted picture of respondent in that it placed him ". . . in ironic circumstances rather than in the tragic circumstance which was thrust upon him" (Respondent's brief pp. 9-10).

It thus appears that the respondent seeks the endorsement from this Court of a principle which would impose a new stricture on freedom of press. To the existing limitation of material falsity, which clearly is not present in the case at bar, the respondent would add a new one of "irony". And even this new proposed limitation, the respondent would have this Court apply to the instant case upon the flimsiest and most dubious of evidence where there is not one unkind or uncomplimentary or false statement made concerning him.

Nor is the respondent's resort to Pennsylvania law any more promising basis for restricting petitioner's privilege to publish the alleged offending article. Such publication was entitled to the constitutional protection of the First Amendment. The controlling Pennsylvania authorities, such as *Jenkins* v. *Dell Publishing Co., supra* and *Aquino* v. *Bulletin Company, supra* and the landmark Supreme Court case of *Time, Inc.* v. *Hill, supra,* have set forth with

great precision the criteria shielding a free press from claims of invasion of privacy. These authorities have been reviewed in some detail in the petitioner's main brief but the Varnish opposing brief has deliberately ignored these authorities completely, except to unjustifiably assert that the *Aquino* case supports the Varnish position. In that case, however, the Court found that there was fictionalization as to the plaintiffs therein. There simply is no such proof of material fictionalization as to respondent in the case at bar.

The supreme importance of the fundamental right of freedom of press has led this Court, in the past, to review the entire record of a case in determining whether the standard of defeasance of First Amendment immunity has been met before such immunity may be withdrawn. Thus, in *Time, Inc.* v. *Hill,* this Court held that the principles set forth in *New York Times, Co.* v. *Sullivan* must be applied in the context of the legal and factual situation involved (385 U.S. at 390-391). Undoubtedly, this Court reviewed the entire record in *Time, Inc.* v. *Hill* to determine whether that record justified the defeasance of the publisher's First Amendment immunity. This Court did not hesitate to overturn the jury verdict rendered in favor of the plaintiff therein when the record failed to show that the article was materially false and was published with actual malice. Not only was there a failure of proof in this instant case as to material falsity, there was no substantial showing of knowledge of such falsity or that there was a reckless disregard of the truth (See petitioner's main brief pp. 5-6).

It is respectfully urged that in the absence of proof of actual malice, there was no warrant here for the award of compensatory damages, let alone punitive damages.

III

The respondent has introduced scandalous matter in contravention of Rule 40, subd. 5 (42 F.R.D. 81, 112).

The respondent has made an unethical as well as an unfounded inflammatory appeal to this Court's sympathies. In his brief he has charged the petitioner with conjuring up "morbid" and "perverse pictures" of kissing dead babies (pp. 13, 20). Upon the trial, Mr. Varnish did not deny that he had kissed his dead children (R. 68).* In fact, an objective reading of the article reveals that the Enquirer's account of this incident was actually a gentle and tender description of an act of grief which most loving fathers would have performed under the same tragic circumstances.

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* As Varnish admitted (R. 68), this area of alleged falsity was the subject of interrogation upon his deposition before trial. Upon that deposition he admitted that he had kissed his children but could not remember if he had said anything (Varnish's deposition, pp. 34-35). Inasmuch as he had admitted upon his deposition that the statement in the article itself was not false, he did not upon the trial assert its falsity. His counsel however, without any factual evidence to support his contention, has sought to make capital of this incident and has recklessly described it as "complete fictionalization" (Respondent's Brief, p. 13) and was a conjuring up of "perverse pictures" (Respondent's Brief p. 20). It is submitted that Mr. Varnish's counsel should not have stooped to this impropriety inasmuch as Exhibit 6 for identification upon the trial,—an article appearing in the San Francisco *Chronicle* on September 28, 1963—expressly contained this reference to Varnish as having kissed each child and having sobbed out his forgiveness. In view of the fact that Mr. Varnish himself, upon the trial, did not assert this description of his grief as having been untrue and especially in view of his admissions upon the examination before trial, no further effort was made to bring Exhibit 6 into evidence.

CONCLUSION

It will be a sad day for the press of this country if irony is to be equated with knowing material falsity and the holding below is permitted to stand on the basis of the flimsy, insubstantial and immaterial evidence of alleged invasion of Varnish's privacy.

It is respectfully urged that the petition for review be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

v.

MELVIN VARNISH,

Respondent.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

With counsel stipulating that the case was governed by the law of Pennsylvania, trial before a jury resulted in an award to the respondent of $5,000.00 compensatory and $15,000.00 punitive damages. Motions for a directed verdict and for judgment n.o.v. were denied by the Trial Court. The judgment of the Trial Court was thereafter affirmed by the Court of Appeals, Judge Hays dissenting. On April 21, 1969, this Supreme Court denied the petition for certiorari herein, with Mr. Justice Black being of the opinion that the petition should be granted.

This petition for rehearing is now respectfully submitted, pursuant to Rule 58, subd. 2, of this Court, on the ground that the issue of the propriety of the award of punitive

damages is a substantial one which was not previously presented to this Court upon the original petition for certiorari.

The Court of Appeals below accepted the respondent's contentions "that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth. . . ." (App. A 5). The petitioner submits to this Court that while such finding would permit a jury to award compensatory damages for invasion of privacy, there was a total failure of proof, under the standards generally required, of any evidence of outrageous conduct which would warrant an award of $15,000.00 punitive damages.

The Restatement of Torts has been cited with approval *and followed by the Pennsylvania Supreme Court* as the standard to which an award of punitive damages is referable. *McSparran* v. *Pennsylvania Railroad Company*, 258 F.Supp. 130 (U.S.D.C., Ed. Pa., 1966); *Scott* v. *Curtis*, 200 Pa.Super. 44, 48, 186 A.2d 403 (1962). Section 908(1) of the Restatement of Torts states:

"§ 908. PUNITIVE DAMAGES.

> (1) 'Punitive damages' are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct."

Comment b. contains this language:

> "Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others."

In *Chambers* v. *Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), "outrageous conduct" was defined to be that which

is "done with a reckless indifference to the interests of others." (at p. 344). In essence, outrageous conduct is one which follows from a desire to wilfully and intentionally inflict harm on another and connotes an attitude or disposition of mind that is essentially perverse. It manifests a vindictive disregard of another's rights. *Richette* v. *Solomon*, 410 Pa. 6 (1963), 187 A.2d 910.

The vice that a divided Court below found in the offending article was that it was "ironic". If irony is compensable, is it also to be the basis for punitive damages despite the fact that the author of the article testified, without being controverted, that he had "tried to write a nice story . . ." and "to take the sting out of" the tragedy of the suicide of Mrs. Varnish and the slaying of her three children? (R. 130-1).

The gravamen of respondent Varnish's position is that the publisher should have told the world "the whole truth" by reprinting the entire suicide note which would have revealed how thoroughly miserable a husband he really was. As Judge Hays observed in his dissent below:

> "If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light." (App. A 8).

It is significant that the article contained not one unkind word about Varnish nor about the deceased. There is no word about which even the deceased would have complained in her lifetime. The plaintiff's complaint is grounded on the circumstance that the publisher was sensitive enough (but if the Court below is correct, not *sensible* enough) to have refrained from describing Varnish as "impossible" and as having given his wife "a miserable life".

Even the most that Mr. Varnish could urge against the public article was that it:

> "*implies* that I don't know my wife, that I don't care that I don't love my children. This summarizes this whole thing up" (Tr. 68; emphasis added).

This was an implication, apparently, that Varnish drew, but a fair reading of the article contains not a word that makes any such implication whatsoever. That he chose to infer otherwise and to find irony in an article whose writer deliberately sought to write as a "nice story" (footnote, App. A 5) is an exercise in paradox: the considerate reluctance of the publisher to "invade the privacy" of Varnish's personal life by disclosing the uncomplimentary references to him in his wife's suicide note is to be deemed an invasion of his privacy.

To permit an award of exemplary damages to stand in this case, based upon the trial record, would be truly Orwellian for it means nothing else but that a publisher who commendably refused to dredge up the seamy aspects of a complainant's life is to be deemed to have perpetrated "outrageous conduct" and, therefore, properly punishable by paying punitive damages. Not only would the Court be withdrawing constitutional protection from the publisher's description of the deceased wife as "the happiest," but it would be withdrawing constitutional protection from the right of the publisher not to publish material concerning Varnish that could only have reflected Varnish, more than before, in an uncomplimentary light.

The majority of the Court of Appeals below agreed with Varnish that the published article

> ". . . cast him in a false and unfavorable light, that the 'happy wife and mother' theme used throughout

> the article was fictitious and was intended to be ironic, to indicate plaintiff's insensitivity and lack of caring and understanding for his wife." (App. A 5).

The Court of Appeals then concluded that the record showed that Mrs. Varnish "was in reality a despondent, depressed and extremely unhappy woman" (App. A 5). The suicide note might indicate that she was so, but such notes generally reveal only the disturbed condition of mind of the suicide at the time of the event. The contents of that note are not to be considered as the objective, calm and dispassionate description of her marriage with Mr. Varnish. The majority of the Court of Appeals conceded that there was documentary evidence of neighbors having advised the police that the Varnishes "seemed to get along fairly well." (App. A 6). However, the Court of Appeals completely ignored the fact that Varnish himself testified on cross-examination that, by and large, things ran smoothly in his household and there were certain times when his wife was "bright and cheerful." (Tr. 50-52); that a newspaper article quoted him as having said "I can't explain it; we had no difficulties." (Defendant's Exhibit B) and another newspaper article stated that he knew of no reason for the tragedy (Plaintiff's Exhibit 6). In addition, Varnish himself testified on trial:

> "I don't know to this day why my wife would kill herself" (Tr. 70).

Concededly, the article erred in describing Mrs. Varnish as the "happiest wife" but there was substantial evidence, as indicated above, to show that Mrs. Varnish was not an unhappy person, prior to the time she took her life and the lives of her three children. Upon this inaccurate and

allegedly ironic use of the suffix "iest" has been reared in the case at bar a conclusion of outrageousness and insensitivity that has permitted an award of punitive damages. This result is wholly at variance with the standards which the Pennsylvania courts have prescribed for the imposition of punitive damages and constitutes a grave threat to freedom of the press. In *Time, Inc.* v. *Hill,* 385 U.S. 374, Mr. Justice Brennan observed:

> "We create a grave risk of serious impairment of the indispensable service of free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated with a person's name . . . particularly as related to nondefamatory matter." (p. 389).

Given the circumstances in the case at bar, it is respectfully submitted that they could not and should not warrant the punishment of the publisher by burdening it with punitive damages. *Szekely* v. *Eagle Lion Films, Inc.,* 140 F.Supp. 843, 850-1 (U.S.D.C., S.D.N.Y., 1956), aff'd 242, F.2d 266, cert. den. 77 S. Ct. 1382, 354 U.S. 922, 1 L.Ed. 2, 1437.

This Court has recognized that an award of exemplary damages depends wholly upon the motive, the purpose and the condition of mind and heart of the wrongdoer and the circumstances and manner of doing wrong. *Bucher* v. *Krause,* 200 F.2d 576, cert. den. 73 S. Ct 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing den. 74 S.Ct., 17 346 U.S. 842, 98 L.Ed. 363.

The Restatement of Torts, Section 908, comment (d), uses the following language:

> "It is error for the trier of fact to award punitive damages where there has been no bad motive or wanton indifference; . . ."

It would be appropriate to inquire whether a free press can flourish if publishers of magazine articles and newspaper articles must be attuned to ironic implications in their articles, even where those articles are devoid of personal attack, degradation, depreciation and unkindness, and that if they should fail to recognize such irony then they shall have to answer in treble damages. To permit the award for exemplary damages to stand in this case is to fly in the face of literally hundreds and thousands of articles published daily and weekly which are replete with ironic implications. There has never been a standard raised for the press in this country that irony constitutes a compensable abuse of the exercise of the right of publication and that, even more, it is punishable by having exemplary damages awarded.

To insist that a publisher publishes at his peril unless, in describing a newsworthy event, such as the suicide and triple infanticide in the case at bar, he reveals all of the contents of a suicide not,—even those that are uncomplimentary to a surviving parent,—is to withdraw from publishers the constitutional protection of their rightful exercise of self-restraint, editorial judgment and literary freedom. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Admittedly, the publishing standards generally of the petitioner in the case at bar are not on a parity with those of the *New York Times.* But these standards are not the subject of controversy here, but rather whether the published article itself fell so far below the standards of propriety and fair conduct as to entitle the respondent to an award of punitive damages. The issue here is a grave one

with, it is respectfully submitted, monumental significance for the press of this country. If this petitioner is to be punished for *not* revealing the full uncomplimentary text of a suicide note, publishers must concern themselves with the fear of being punished for much lesser offenses than what a divided Court of Appeals held to be offensive below.

Petitioner, therefore, prays that this Court grant rehearing herein and that, upon such rehearing, the petition for the writ of certiorari should be granted with respect to the reversal of the judgment of $15,000.00 punitive damages.

Respectfully submitted,

IRWIN M. TAYLOR
Attorney for Petitioner

CERTIFICATE OF ATTORNEY

I, Irwin M. Taylor, certify that I am the attorney for the petitioner herein, Best Medium Publishing Co. Inc.; that this petition for rehearing is presented in good faith and not for delay; and the petition is restricted to the above circumstances of substantial effect.

/s/ Irwin M. Taylor
Irwin M. Taylor